

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 01-0215

SALES AND USE TAX

FOR TAX PERIODS: 1995-1997

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**Issues**

**1. Sales and Use Tax:** Delivery Charges

**Authority:** IC 6-2.5-2-1, IC 6-2.5-4-1(b), IC 6-2.5-4-1(e)(2), IC 26-1-2-401(2), IC 26-1-2-308, IC 26-1-2-401, 45 IAC 2.2-4-3(a), Indiana Department of Revenue v. Martin Marietta Corporation, 398 N.E.2d 1309 (Ind. App. 1979).

The taxpayer protests the imposition of tax on freight charges.

**2. Sales and Use Tax:** Miscellaneous Receipts

**Authority:** IC 6-2.5-2-2, IC 6-8.1-5-1 (b).

The taxpayer protests the imposition of tax on miscellaneous receipts.

**Statement of Facts**

The taxpayer operates an office forms and supplies business. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department", assessed additional sales tax. The taxpayer protested the assessment and a hearing was held. Further facts will be provided as necessary.

**1. Sales and Use Tax:** Delivery charges.

**Discussion**

The taxpayer sells office forms and items that are embossed with the customer's name to businesses in Kentucky, Indiana, and Florida. All inventories are ordered from printers or other

suppliers who drop ship the items to the customers. Shipment is handled by UPS, RPS or occasionally truck. The supplier bills the taxpayer for the item and freight (often shipping and handling or other added charges) and no sales tax. The taxpayer then bills his customer for the item, mark up, freight and sales tax on the cost of the item plus mark up. The department assessed sales tax on the freight charges and the taxpayer protested this assessment.

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1(b). Except for certain enumerated services, sales of services are generally not retail transactions and are not subject to sales tax. Delivery prior to the transfer of title to the purchaser is, however, one of the enumerated services that is specifically subjected to sales tax. IC 6-2.5-4-1(e)(2).

There are two prerequisites for separately stated delivery charges to be subject to sales tax. The Regulations state these prerequisites as “[s]eparately stated delivery charges are considered part of selling at retail and subject to sales and use tax if the delivery is made by or on behalf of the seller of property not owned by the buyer.” 45 IAC 2.2-4-3(a).

The application of sales tax to these delivery charges then depends upon when title to the goods transferred to the buyer. The Indiana law concerning the passing of title of goods to the buyer states that, “Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods. . . .” IC 26-1-2-401(2). The taxpayer contends that it has completed his performance with regard to the sales of business forms when the printing companies load the shipments onto the common carrier and delivery to the buyer takes place at the printing factory prior to shipment and any delivery services or freight charges after that point would not be subject to the sales tax.

In support of its contention that the delivery charges are non-taxable services, the taxpayer cites Indiana Department of Revenue v. Martin Marietta Corporation, 398 N.E.2d 1309 (Ind. App. 1979). In that case the corporation excavated, processed and sold sand, gravel and other aggregate materials. Usually the product was shipped to buyers by common carrier. Customers were billed by a single invoice listing the price of the goods and delivery charges separately. The corporation did not collect and remit sales tax on the cost of the delivery by common carrier. The court, finding that the freight charges were not subject to sales tax, stated on page 1313 in pertinent part as follows:

Although the transactions here involved were made pursuant to oral agreements, with no discussion of “delivery” or “passage of title”, the relevant Commercial Code provisions imply a “shipping contract” which provides that delivery occurs when the goods are placed on the carrier, IC 26-1-2-308, and that title to the goods passes to the buyer at the time of delivery, IC 26-1-2-401. Thus, we agree that the freight charges were incurred after delivery and in respect to property owned by the buyer.

The taxpayer submitted invoices from the factories to the taxpayer indicating that the purchases were F.O.B. the loading dock of the factory. These invoices indicate that the property was

transferred to the taxpayer at this time. The taxpayer was then responsible for the delivery to the final purchasers at their locations. Title to the business forms did not transfer to the taxpayer's customers until the property was actually delivered to them at their location. This is, therefore, different than the Martin Marietta case where title to the tangible personal property had been transferred to the customer prior to the delivery services.

In this case the delivery charges were for services performed prior to the transfer of title to the customer. Therefore these charges are properly subject to the sales tax.

### **Finding**

The taxpayer's protest is denied.

## **2. Sales and Use Tax: Miscellaneous Receipts**

### **Discussion**

The audit also assessed sales tax on the "miscellaneous receipts" in the cash accounts pursuant to IC 6-2.5-2-2 that states in pertinent part that the sales tax is "measured by the gross retail income." The taxpayer contended that these sums represented tax refunds and monies from loans that the owner loaned to the taxpayer business.

All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b). In support of its contention that the miscellaneous receipts were exempt from the sales tax, the taxpayer submitted a register report with distribution detail. This report indicated that the funds were used to pay petty cash type expenses such as postage, parking and office expenses. In this case the taxpayer did not provide any documentation that the cash receipts were actually non-taxable loans from the owner to the taxpayer business. The distribution records do not verify the source of the funds in the account that was called "miscellaneous receipts." The taxpayer did not sustain its burden of proving that the receipts in this account were not subject to the sales tax.

### **Finding**

The taxpayer's protest is denied.